Supreme Court, U.S.
FILED

02 571 OCT 16 2002

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No. 02-_____

IN THE

Supreme Court of the United States

EBONY PATTERSON, ET AL.,
PETITIONERS,
V.
JENNIFER GRATZ AND PATRICK HAMACHER,
AND
LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a university policy that considers race and ethnicity as one of several factors in its admissions process justified under the Equal Protection Clause of the Fourteenth Amendment both by a compelling interest in assembling a diverse student body, and a compelling interest in remedying past and present discrimination at the university, whether or not the university articulates the remedial justification as a basis for the policy?

PARTIES TO THE PROCEEDING

Petitioners are Ebony Patterson, Ruben Martinez, Laurent Crenshaw, Karla R. Williams, Larry Brown, Tiffany Hall, Kristen M.J. Harris, Michael Smith, Khyla Craine, Nyah Carmichael, Shanna Dubose, Ebony Davis, Nicole Brewer, Karla Harlin, Brian Harris, Katrina Gipson, Candice B.N. Reynolds, by and through their parents or guardians, Denise Patterson, Moises Martinez, Larry Crenshaw, Harry J. Williams, Patricia Swan-Brown, Karen A. McDonald, Linda A. Harris, Deanna A. Smith, Alice Brennan, Ivy Rene Carmichael, Sarah L. Dubose, Inger Davis, Barbara Dawson, Roy D. Harlin, Wyatt G. Harris, George C. Gipson, Shawn R. Reynolds, and Citizens for Affirmative Action's Preservation. They are defendant-intervenors in the District Court and appellants in the Court of Appeals.

Respondents are Jennifer Gratz and Patrick Hamacher. Respondents were plaintiffs in the District Court and were appellees in the Court of Appeals with respect to intervenors' appeal.

Additional Respondents are Lee Bollinger, James J. Duderstadt, and the Board of Regents of the University of Michigan. These respondents were defendants in the District Court and were appellees in the Court of Appeals with respect to intervenors' appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Patterson, *et al.* (defendant-intervenors below) ("intervenors") respectfully request that this Court issue a writ of certiorari to review a judgment of the United States District Court for the Eastern District of Michigan that is presently pending on appeal in the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan granting summary judgment against intervenors, and rejecting their claim that the University of Michigan ("University") was justified in considering race in its admissions policy in order to remedy the effects of past and present discrimination, is reported as *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001) (App. 66a).[1] The Court of Appeals has not yet ruled on the appeal of that decision.

The opinion of the district court on the other parties' cross-motions for partial summary judgment, dealing with the question whether the University could consider race as an admissions factor in order to achieve a diverse student body, is reported as *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (App. 1a). The Court of Appeals has not yet ruled on the appeal of that decision. Plaintiffs in this action have filed a separate Petition seeking review of that ruling, No. 02-516 in this Court (filed October 1, 2002).

The opinion of the United States Court of Appeals for the Sixth Circuit in the related case of *Grutter v. Bollinger* is reported at 288 F.3d 732 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (August 9, 2002) (No. 02-241) ("*Grutter*").

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[1]Citations in this form are to the Appendix to the Petition in *Gratz v. Bollinger*, No. 02-516.

JURISDICTION

The district court entered judgment pursuant to Fed. R. Civ. P. 54(b) on March 21, 2001 with respect to intervenors' claim that the University's use of race in admissions was justified as a remedy for the present effects of past and continuous discrimination (App. 95a). Intervenors' appeal from that decision was docketed in the Court of Appeals as No. 01-1438.[2]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which provides for review by writ of certiorari of any case pending in the court of appeals, even if final judgment has not been entered by that court. *See also* 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."). *See infra* at pp. 17-20.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

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[2]The District Court had previously issued an order on January 30, 2001 certifying two questions for interlocutory review pursuant to 28 U.S.C. § 1292: (1) whether a public university has a compelling interest in achieving the educational benefits of diversity that will justify the consideration of race as a factor in admissions; and (2) if so, whether the admissions systems employed by the University of Michigan from 1995 to 2000 were properly designed to achieve that interest (App. 56a). Cross-appeals on those questions were docketed in the Court of Appeals as Nos. 01-1333, 01-1416, and 01-1418. Intervenors have argued in support of diversity as a compelling state interest in those appeals.

2. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

A. Introduction

At stake in these extraordinary cases (*Grutter* and *Gratz*) is whether the University of Michigan (and, by extension, other institutions of higher education) may consciously consider race in its admissions decisions to achieve the educational benefits that flow from a diverse student body and to remedy the effects of prior discrimination in which it participated. Meaningful but modest integration did not come to the University fortuitously. It was and is the consequence of affirmative efforts to overcome past discrimination and the educationally limiting impact of racially isolated classroom and campus settings.

As the respective plaintiffs in both *Grutter* and this case have noted in their petitions for certiorari, the courts of appeals have divided on this issue of profound national importance in prior higher education affirmative action cases. *See Gratz* Petition, No. 02-516 at 20-24 (citing cases); *Grutter* Petition, No. 02-241 at 21-25 (citing cases). Both *Grutter* and *Gratz* have fully developed records, and full representation of all interested parties. Were the Court to grant the writs sought by those petitioners as well as by intervenors here, it will have before it all of the parties and questions necessary to resolve this issue definitively.

Like the *Gratz* plaintiffs, petitioners believe the Court should exercise its discretion under Rule 11 of its Rules and grant a writ of certiorari before judgment to the United States Court of Appeals for the Sixth Circuit, which has not yet entered judgment on the various appeals pending before it in the *Gratz* case.

Like *Grutter*, the *Gratz* case presents the vital issue of whether diversity is a compelling governmental interest that justifies the use of race-conscious admissions in higher education. Both cases present an additional issue arising from the confusion in the lower courts about the availability of remedial justifications for the use of race as a factor in university admissions. In both cases, the University was understandably unwilling to admit its own past discrimination as a justification for its policies. The Court of Appeals recognized this, and, in ordering intervention as of right in both cases, found that the University was "unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some admissions criteria and . . . these may be important and relevant factors in determining the legality of a race-conscious admissions policy." *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999). The district court, however, then effectively rejected as irrelevant the "strong basis in evidence" of discrimination presented by intervenors, *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), because the University would not admit to the evidence of its past or present discrimination.

If the Court is going to consider the diversity question, it should grant certiorari in both *Grutter* and *Gratz*, because the cases present the issue in different contexts. The undergraduate admissions scheme administered by the University is typical of a large institution in which, as a matter of expediency, the overwhelming number of applicants leads to a rating system in which admissions criteria are assigned numerical values. The

law school, while processing a significant number of applicants, is nonetheless able to provide somewhat greater individual attention to each application. Moreover, diversity at each level of study has special importance for differing reasons. In the undergraduate setting, student life outside the classroom, in student organizations, in dormitories, and on athletic teams, is as much a part of the educational experience as is the classroom experience, and for many students, undergraduate study offers their first exposure to heterogeneity and the rich diversity of backgrounds that characterizes our nation. In law schools, most classroom instruction heavily emphasizes the clash of viewpoints and arguments as a means of developing and sharpening analytic skills, a pedagogy that the record in *Grutter* indicates is enriched by student diversity.

In addition, in order for the Court to have all relevant issues before it, the Court should grant *this* petition for certiorari. The University contends that diversity is a compelling interest because of its educational benefits, as do the present petitioners. However, the school's unwillingness to advance an equally compelling interest supporting its admissions policy should not cause this Court to ignore the substantial body of evidence suggesting that the University had long treated minority applicants and students in a racially discriminatory fashion. Here, the intervenors presented more than sufficient proof to establish a strong basis in evidence that remediation of past and present discrimination by the University and its officials is also a compelling justification for considering an applicant's race or ethnicity as one factor in making admissions, but that evidence was deemed irrelevant since it was not proffered by the University.

This Court needs to resolve the implications of a rule that prohibits others, such as intervenors here, from introducing evidence to support a remedial justification for a university's policies that the institution itself has not, for whatever reason,

offered. The administration of justice will be best served by having all issues before the Court at one time on the most complete possible record. If the Court is going to address the University's admissions program, therefore, petitioners respectfully request that the Court grant this petition, the *Gratz* plaintiffs' petition, and the petition in *Grutter,* and set the matters for argument in tandem.

B. Prior Proceedings[3]

1. The District Court

In 1997, the *Gratz* plaintiffs, two white individuals who were denied admission to the University of Michigan's undergraduate School of Literature, Science, and the Arts ("LSA"), filed this lawsuit on behalf of themselves and a class, alleging that the University's admissions policies unlawfully discriminated against white applicants (JA 34). The University answered by defending its use of race to achieve a diverse student body (JA 148).

Also in 1997, the *Grutter* plaintiffs, other unsuccessful white applicants, represented by the same lawyers as the *Gratz* plaintiffs, sued the University of Michigan's law school making virtually identical allegations. The University answered with the same defense. Although both cases were filed in the Eastern District of Michigan, raised identical legal issues, and included the same counsel, they were assigned to two different district court judges and were not consolidated.

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[3]Some of the statement of facts contained in the petition herein are based on a "Joint Summary of Undisputed Facts" that was submitted by the parties to the district court (App.106a-118a). Additional citations herein are to documents contained in the Joint Appendix ("JA") filed by the parties in the Sixth Circuit.

In 1998, various affected parties sought to intervene in each case. Seventeen African-American and Latino high school students and Citizens for Affirmative Action's Preservation ("CAAP") moved to intervene in the *Gratz* case. Intervenors sought to join the University in defending the use of race to achieve a diverse student body. Intervenors also sought to advance a remedial justification for the University's admissions policies based on past and present discrimination against African-American and Latino applicants and students. A number of individuals and organizations sought intervention in the *Grutter* case with similar aims.

Both district court judges denied intervention. Proposed intervenors appealed and a single panel of the Sixth Circuit heard argument in both cases on the same day. The Sixth Circuit reversed, finding that intervenors had substantial legal interests at stake, and ordered intervention as of right in both cases. *Grutter v. Bollinger*, 188 F.3d 394, 401 (6th Cir. 1999).

In the *Gratz* case, the plaintiffs and the University each moved for summary judgment on the basis of a stipulated record. Intervenors joined the University's position that diversity is a compelling state interest justifying a narrowly tailored admissions program that considers race as one of many factors. In addition, intervenors argued that the extensive evidence of past and present discrimination by the University would, by itself or in conjunction with the academic interest in diversity, justify the use of race in admissions. Plaintiffs admitted that a diverse student body would provide educational benefits to all students, but nevertheless argued that these benefits should be denied as violations of law. Plaintiffs also argued that the remedial justification could be raised only by the University. In the law school case, similar arguments were made by all parties at trial.

The district court in the *Gratz* case ruled in favor of the University on the issue of whether diversity was a compelling state interest, and found that the specific current policies of the University were narrowly tailored to that interest (App. 1a). However, the court subsequently granted summary judgment against intervenors, holding that since the University had not advanced a remedial justification, its admissions practices could not be justified on remedial grounds, regardless of proof of discrimination. The court also found intervenors' uncontested evidence of past and present discrimination insufficient as a matter of law. App. 66a.[4]

2. The Court of Appeals

All parties appealed. The Sixth Circuit heard argument in both cases *en banc* on the same day. On May 14, 2002, that court reversed the decision in the law school case, holding that diversity was a compelling state interest and that the law school's admissions policies were narrowly tailored to that interest. *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002). The court did not address whether an interest in remedying past discrimination is sufficiently compelling for equal protection purposes. *Id.* at n.4. The court has not yet ruled on the appeals in the undergraduate case. *Id.* at n.2.

Plaintiffs in the respective cases have filed petitions for writs of certiorari to review the Court of Appeals' ruling in the law school case and the district court's ruling on their summary judgment motion in the undergraduate case. Intervenors are

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[4]The district court in *Grutter* ruled for plaintiffs, finding that diversity was not a compelling state interest and that the specific current policies of the University were not narrowly tailored (*see* App. 189a in *Grutter v. Bollinger*, No. 02-241). It also rejected the intervenors' remedial justification arguments as an alternative basis for a race-conscious admissions process (*id.*).

filing this petition so that the Court will also have before it the remaining issue decided by the district court, respecting intervenors' proffered evidence to support a remedial rationale for the University's admissions policy.

C. Factual Background

The University provided an extraordinary wealth of evidence in both the undergraduate and the law school case to support its assertion that there are significant benefits to an education in a racially diverse environment. This evidence distinguishes the value of diversity in the setting of a university, where the program itself is enhanced by diversity, from diversity in other settings. Intervenors will not endeavor to catalogue that evidence here and anticipate that it will be described by the University in its response to the *Gratz* plaintiffs' petition.[5]

The *Gratz* intervenors provided extensive and unrebutted evidence to support the conclusion that, but for the inclusion of race as one factor, among others, the University's admission criteria would have a disproportionate adverse impact on African-American and Latino applicants, and that such criteria are unnecessary to admit qualified students. Additionally, intervenors submitted extensive evidence that demonstrated a long-standing history of racial discrimination, exclusion, and isolation at the University which is currently manifested in a racially hostile environment on the

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[5]Plaintiffs did not challenge this evidence. Indeed, as the district court observed, "[p]laintiffs have presented no argument or evidence rebutting the University Defendants' assertion that a racially and ethnically diverse student body gives rise to educational benefits for both minority and non-minority students. In fact, during oral argument, counsel for Plaintiffs indicated his willingness to assume, for purposes of these motions, that diversity in institutions of higher education is 'good, important, and valuable'" (App. 25a).

undergraduate campus. Intervenors' evidence provides an alternative justification for the University's admissions programs: remedying past and present discrimination against African-American and Latino students and applicants. This evidence, which the University chose not to present (but did not contest), also provides context to the importance of diversity at the University.

1. The Discriminatory Impact of the Current Selection Criteria

Because of the number of applicants typical of large universities, Michigan has chosen to utilize grades and test scores using a formula (in this case reflected in the acronym "SCUGA") in making admissions decisions at the undergraduate level. The University considers its own rating of the applicant's high school ("S"), the rigor of the curriculum taken by the applicant ("C"), socio-economic disadvantage or under-represented minority status ("U"), the geographic residence of the applicant ("G"), and his or her alumni status ("A") (JA 3935). Plaintiffs challenged only the consideration of race or ethnicity as part of factor "U."

However administratively convenient they may be in distinguishing among non-minority candidates, four of these factors (plus the remainder of factor "U") have a statistically significant and consistently negative effect on the admissions chances of African-American and Latino applicants. For example, the University gives extra points to students who come from the upper peninsula of Michigan or whose parents were alumni. The additional points awarded under the geography and alumni factors are available almost exclusively to non-minority applicants (JA 1998, 3481). Under-represented minority applicants are — in part because of the discrimination that has persisted at the University — less likely to have alumni parents or relatives, and are disproportionately first-generation

applicants to college. As a result, they do not receive the benefit from the alumni factor that their white counterparts receive. The geography factor also exacerbates the effect of racial segregation in the state by giving extra points to students who come from one of the forty-five northern Michigan counties, all of which, in the highly segregated state of Michigan, are overwhelmingly white (JA 3482).

The school and curriculum factors have similar exclusionary effects due, in part, to the separate and unequal K-12 schooling offered in Michigan (JA 3478-79, 3699). The overwhelming number of minority high school students in Michigan attend schools that have relatively low "S" factor ratings, and relatively few minority students are in schools that earn high "S" factor ratings. The "C" factor, which assigns a greater number of points to applicants who have taken Advanced Placement and other honors courses, produces a similar discriminatory effect. Again, here, by virtue of the fact that African-American and Latino children are segregated overwhelmingly in schools that offer few, if any, honors courses, they are unable to benefit from this factor to the same extent as their white counterparts, even if they are achieving at the highest levels at the schools they do attend. Thus, simply by virtue of where they attend school, white students are able to earn "S" and "C" factor points that a disproportionate number of African-American and Latino students, regardless of their aptitude, simply cannot earn.

In sum, the use of the SCUGA factors would, if race and ethnicity were not separately considered as a factor in the admissions process, have a statistically significant disparate impact on minority applicants. Moreover, the use of race and ethnicity in the admissions process needs to be understood in the context of the University's long history of discrimination on campus.

2. The University's History of Discrimination

The uncontested evidence in the record reveals an extensive history of discriminatory treatment of African-American and Latino students by the University, the effects of which are seen today in the continued under-representation of such students on campus. These practices range from maintaining segregative and exclusionary practices on campus, refusing to take meaningful steps to recruit, enroll, and retain minority students, to ignoring, if not sanctioning, a campus climate that is often marked by racial hostility. Through the years, the University minimized or sidestepped criticism of its discriminatory practices by the federal government, state legislators, the Regents of the University, civil rights organizations, and its own faculty and students (JA 2261-83). Almost every significant effort to integrate minorities into the campus came through pressure by students and others, but it was not until the establishment of the Michigan Mandate in 1988 that the University began a significant effort to dismantle this pattern of racial exclusion.

a. 1817-1964: More than a Century of University Segregation and Discrimination

The University was founded in 1817; however, it was not until 1868 that the first African-American students were enrolled (JA 2265). The University segregated its own campus housing, and excluded students of color from fraternities and sororities into the 1960's, with the support of the University's administration (JA 3757).

From 1949 to 1952, the Michigan Civil Rights Congress and other groups called for an end to discriminatory clauses in the constitutions and by-laws of all campus organizations (JA 2266). However, then-University President Harlan Hatcher flatly rejected the proposal, and effectively allowed all University organizations to continue their discriminatory

practices. In 1959, one observer noted that, as of that year, "[n]o University fraternity chapter *had ever* accepted a Black student" (JA 2272) (emphasis added).

In contrast to its resistance to ending practices that segregated and isolated American racial and ethnic minority students, the University took affirmative steps to integrate its foreign students into the entire range of campus life, including by giving them priority over African-American students in both admissions and housing (JA 2270).

b. 1965-1980: The First "Mandate" — The Opportunity Program

Against the backdrop of more than one hundred years of segregation on the Michigan campus, the University announced the Opportunity Program, ostensibly designed to recruit and admit socially disadvantaged students to the University. While minority enrollment increased in the years after the announcement of the University's first "mandate" — the Opportunity Program — hostility aimed at students of color at the University persisted.[6] Minority students were still excluded from campus activities and university social traditions (JA 2274-75, 2276, 3768).

In 1966, the Department of Defense investigated the University's compliance with Title VI of the 1964 Civil Rights Act. The Department's report reflected Michigan's reputation among students and faculty as a school "basically for rich white students" and urged campus administrators to increase recruitment of black students, faculty and staff (JA 2270-71).

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[6]By 1966, 400 Black students were enrolled at the University, representing only 1.2 per cent of the total student population of about 32,000. At that time, nearly 55 per cent of Detroit's 300,000 elementary and secondary school students were African-American (JA 2265).

Nonetheless, the University's administrators did little to change its discriminatory policies.

In 1970, intense dissatisfaction with the University's failure to address campus racism and to increase minority enrollment culminated in a series of student strikes. In February of that year, a student group calling itself Black Action Movement ("BAM I") pressed the Regents and University administration to substantially increase African-American enrollment and increase financial aid so that African-American and Latino students, disproportionately poor, could matriculate if admitted (JA 2278-80). The enrollment proposal won support from many, including then-Governor William Milliken. However, University administrators rejected the proposal. Only after the BAM I students went on "strike" did the University agree to pursue some admissions and recruitment efforts (JA 2284-85). After the BAM I strikes, African-American presence on campus nearly doubled from 3.5 per cent of all students in 1970 to 6.8 per cent in 1972 (JA 2287).

However, with this modest increase in minority enrollment, the University continued to tolerate racial tensions on campus. Racial incidents in campus dormitories were widespread, prompting complaints of dehumanizing treatment of African-American students (JA 2293). Investigations of these incidents concluded that some staff members' racist attitudes — that were tolerated by the University — contributed to the problem (JA 2294-96). Rather than rectify the hostile environment on campus, the University exacerbated it in 1973 when it abandoned its short-lived minority admission and recruitment programs (JA 2289). Consequently, African-American enrollment plummeted, falling to a low of 4.9 per cent between 1973 and 1983 — its lowest level since 1970 (JA 2291-92).

In response, in 1975, minority students organized "BAM II," requesting increased support services and an effective institutional effort to address the persistent negative racial climate on campus (JA 2298). Then-President Robben Fleming refused both requests (JA 2299). With no minority recruitment and admissions effort in place, well-publicized discrimination on campus and no corresponding University redress, enrollment and retention rates of minorities continued to decline: between 1976 and 1985, the University lost a full 34 per cent of its African-American students (JA 3885).

c. 1980 - 1990: The Michigan Mandate

In 1980, a University sociology professor conducted a study of undergraduates at Michigan that found 85 per cent of African-Americans surveyed reported racial discrimination on campus from their peers, administrators or professors and more than 60 per cent stated that they had little or no contact with African-American faculty and staff (JA 2312-13).

In 1986 and 1987, a number of racist incidents occurred on campus — some of which would capture national media attention — including the dissemination of a racist flyer announcing "open season on porch monkeys . . . (regionally known as: Jigaboos, Saucerlips, Jungle Bunnies and Spooks)" (JA 2323) (emphasis omitted), and the broadcast of racist jokes on WJJX, the University's campus radio station (JA 3759-61). The WJJX incident received national press coverage and resulted in a hearing before the Michigan State Legislature (JA 2330). The University's own investigation concluded that the broadcast was "only a symptom of a pervasive atmosphere on this campus" (JA 2327).

On the heels of these incidents, then-provost James Duderstadt announced plans for a new initiative aimed at quelling racial discontent at the University. Duderstadt announced the Michigan Mandate, an effort that sought to

increase the number of students and faculty of color, to provide "equal opportunity" and "equal access to all educational resources to students from under-represented racial and ethnic" groups (JA 1378-79), to remedy institutional racism on campus (JA 1383), and to promote a more racially and ethnically diverse campus to prepare students for an increasingly multicultural world (JA 1376). The Mandate itself acknowledged the "prejudice, bigotry, discrimination and even racism" on the Michigan campus, as well as its goals of "remov[ing] institutional barriers to full participation in the life and leadership of [the] institution" (JA 1390).

d. Persisting Effects of The University's Long-Maintained Discrimination

Notwithstanding the Michigan Mandate, the negative and hostile climate at the University remains one of the manifestations of its discriminatory policies. Recently, as in previous years, the campus has been plagued by targeted racist actions against African-American and Latino students, including racist graffiti in the hallways of campus buildings and in dorm rooms; racially derogatory remarks and epithets;[7] and racist literature and lettering placed on campus buildings (JA 2393, 3751). Additionally, African-American and Latino undergraduate students endure more subtle forms of discrimination — negative racial stereotypes by professors and classmates, exclusion from campus clubs and social groups, racist remarks and "jokes," and lack of critical academic support — all of which can erode their sense of belonging at

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[7]In 1998, for example, an African-American junior awoke to find a note posted on her dorm room door with the words "two stupid bitches" and "niggar" [*sic*] along with two swastika symbols. Shomari Terrelonge-Stone, *'U' Prof. Studies Racial Tolerance*, THE MICHIGAN DAILY ONLINE, November 3, 1999, available at http://www.michigandaily.com (JA 3777-79).

the institution and their ability to form peer networks (JA 2396-2398, 2401, 2415).

Discriminatory treatment at the hands of University police is also endemic. In the 1999-2000 school year, African-American and Latino student groups on campus complained of being subjected to a substantially greater level of surveillance than predominantly white groups (JA 2408-10, 3752-53, 3740-41).

Such a negative racial climate can affect student performance and limits the informal learning, networking, and interacting that takes place with their peers outside the classroom (JA 2422). A negative racial climate tolerated and maintained over several decades also deters other African-Americans and Latinos from enrolling (JA 2389-91). Studies conducted by the University revealed that the primary concern expressed by more than one-third of the African-Americans and Latinos who chose not to apply as undergraduates was racism on campus (JA 3833, 3840).

REASONS FOR GRANTING THE WRIT

I

The Court Should Grant The Writ Before Judgment By The Court Of Appeals Because This Case Is Of Such "Imperative Public Importance" As To Require Immediate Determination In This Court

This Court may invoke its certiorari jurisdiction either "before or after rendition of judgment" by a court of appeals. 28 U.S.C. § 1254(1). *See also* 28 U.S.C. § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court

of appeals may be made at any time before judgment."). However, the Court's rules counsel that "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

While the Court is "ordinarily reluctant to exercise [its] certiorari jurisdiction" before entry of a final judgment in the lower courts, *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997), it has not hesitated to grant certiorari in such circumstances when the issues raised are "of great significance and demand prompt resolution." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *see also Mistretta v. United States*, 488 U.S. 361, 371 (1989) (certiorari granted before judgment in case challenging validity of sentencing guidelines adopted under Sentencing Reform Act of 1984 "because of the 'imperative public importance' of the issue, as prescribed by the disarray among the Federal District Courts"); *Brown v. Board of Education*, 347 U.S. 497, 498 (1954) (certiorari granted before judgment "because of the importance of the constitutional question presented"); 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4036, at 21 (2d ed. 1988) ("certiorari before judgment is occasionally granted simply because it is thought important that issues of great contemporary moment be settled quickly and finally") .

Intervenors respectfully submit that this case is of such "imperative public importance" as to warrant deviation from the normal appellate practice and to require determination in this Court at this time. The issue raised by this case — the circumstances under which it is constitutional for race or national origin to be used as a factor in the admissions process of public universities — has enormous implications for literally

millions of students.[8] As Justice Ginsburg (joined by Justice Souter) recently observed in a case involving the constitutionality of the admissions process at the University of Texas Law School: "Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance." *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Opinion of Ginsburg, J., joined by Souter, J., respecting the denial of certiorari).

With some public universities able to take account of race and national origin in their admissions practices and others not, as a result of the split in the courts of appeals on this question, *see Grutter* Pet., No. 02-241, at 21-25; *Gratz* Pet., No. 02-516 at 20-24, and the Court's decision in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) under siege, the time is right for this Court to announce definitive constitutional guidelines on this crucial issue. Just as there was "disarray" on a vital question of criminal law that impelled the Court to grant certiorari before judgment in *Mistretta*, so too (as the Eleventh Circuit recently observed) is there anything but unanimity regarding "the status of Justice Powell's *Bakke* opinion as binding precedent on the validity of student body diversity as an interest sufficient to justify race-based school admissions decisions," *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1249 n.13 (11th Cir. 2001) (canvassing

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[8]In its most recent projections, the National Center for Education Statistics predicts that enrollment in degree-granting postsecondary institutions will increase from 15.3 million in 2000 to 17.7 million by 2012, an increase of 15 per cent. It also projects that enrollment in public 4-year institutions will increase from 6.1 million in 2000 to 7.2 million in 2012, an increase of 19 per cent. *See* National Center for Education Statistics, *Projections of Education Statistics to 2012* (31st ed. October 2002), available at http://nces.ed.gov/pubs2002.

wide variety of cases that have considered binding force of Justice Powell's opinion).

While there have obviously been developments in the Court's equal protection jurisprudence since *Bakke* was handed down, the Court has never returned to the subject of university admissions, nor has it "indicated that Justice Powell's approach has lost its vitality in that unique niche of our society." *Smith v. University of Washington Law Sch.*, 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001). Nonetheless, some lower courts have explicitly sought guidance from this Court on this question. *See, e.g., Johnson*, 263 F.3d at 1245 ("we think it important to underscore that the constitutional viability of student body diversity as a compelling interest is an open question, and ultimately is one that, because of its great importance, warrants consideration by the Supreme Court"); *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) ("question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled").

We are "only a generation or so removed from the legally enforced segregation which was used to discriminatorily deny African Americans and other minorities access to education." *Grutter v. Bollinger*, 288 F.3d 732, 764 (6th Cir. 2002) (Clay, J., concurring). If the Court is to grant certiorari to address this profound question of public importance, it should do so in both *Gratz* and *Grutter*. It is hardly an exaggeration to say that the Court's decision in these cases will directly affect the lives not only of this generation of students but of generations of students to follow.

II

The Court Should Also Grant The Writ Before Judgment By The Court Of Appeals Because Similar And Related Questions Of Constitutional Significance Will Be Before This Court If It Grants Certiorari In *Grutter v. Bollinger*

This Court has granted certiorari before judgment in the court of appeals in those circumstances where similar questions have been presented in related cases. In the landmark school desegregation cases in the 1950's, for example, there were three cases pending in the Court involving the validity of state school segregation practices, and the Court took judicial notice that a separate case — *Bolling v. Sharpe* — challenging segregation in the District of Columbia schools was pending in the United States Court of Appeals for the District of Columbia Circuit. The Court then advised that it would "entertain a petition for certiorari" in *Bolling*, "which if presented and granted will afford opportunity for argument of the case immediately following the arguments in the three appeals now pending." *Brown v. Board of Education*, 344 U.S. 1, 3 (1952) (*per curiam*). The Court subsequently granted certiorari in *Bolling* one month later, and heard all of the cases together. *Bolling v. Sharpe*, 344 U.S. 873 (1952). The Court has granted certiorari before judgment in circumstances involving other related cases as well. *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194-95 & n.5 (1978) (certiorari granted in case in which court of appeals had ruled and in second case presenting same question before court of appeals had ruled); *Taylor v. McElroy*, 358 U.S. 918 (1958), 360 U.S. 709, 710 (1959) (certiorari before judgment granted "because of the pendency here of *Greene v. McElroy*" (360 U.S. 474 (1959), which involved essentially the same important constitutional issues); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (certiorari

before judgment granted "by reason of the close relationship of the important question raised to the question presented in *Porter v. Lee*," 328 U.S. 246 (1946)).

In addition to granting certiorari before judgment in *Gratz* because it raises issues of great national importance, there are practical reasons for doing so. *Gratz and Grutter* raise many of the same constitutional questions: whether diversity is a compelling governmental interest sufficient to justify race-based school admissions decisions, and whether the consideration of race is narrowly tailored to achieve that interest. Among its evidence to support the educational benefits that result from a racially and ethnically diverse student body, the University proffered the same expert report in both cases. (*See* JA 1648-1831.)

Grutter presents the Court with the question of the constitutionality only of the University of Michigan's Law School admissions policies; it does not involve the University's undergraduate admissions policies. While similar in some meaningful respects, the two admissions policies are not identical. Law schools, because of their size, consider a far smaller number of applicants than do large undergraduate institutions such as the LSA. Somewhat more individualized examination of each application is therefore often possible at law schools, given the number of applicants; in contrast, at the undergraduate level at most large universities, such as Michigan, some numerical screening system (for example, assigning "scores" to a variety of admissions factors in order to identify groups of applicants whose academic qualifications or lack of qualifications are sufficiently obvious to support decisions to grant or deny admission without further examination) is utilized to facilitate individualized review in cases where it could make a difference. Thus, *Gratz* presents a different context in which to evaluate the permissible use of race in the admissions process.

Gratz presents an additional issue more starkly as well. The evidence in the record shows that diversity has educational importance not only in the classroom, but also in the myriad educational experiences that take place outside the classroom. Because of the nature of undergraduate education, these benefits are of particular importance for college students. Thus, a review of *Gratz* will allow this Court to evaluate fully all of the educational benefits of diversity.

When the Court announces (or revises) a broad constitutional rule, as it will likely do if it grants certiorari in these cases, it would not serve the administration of justice to have before it only the law school admissions program. The record has been fully developed in both cases, and, in granting certiorari in *Gratz* as well as *Grutter*, the Court would be able to fashion constitutional rules that would provide guidance for both undergraduate and graduate admissions programs.

III

The Court Should Grant This Writ To Consider Whether the Constitution Permits The Use Of Race And National Origin In College Admissions Upon A Showing That There Is A Strong Basis In Evidence Of Discrimination Even If That Showing Is Not Proffered By The University

The legal basis for taking race-conscious steps to remedy past and present discrimination is well-established. This Court has held that race-conscious remedies are constitutionally permitted where the public actor has a "strong basis in evidence for its conclusion that remedial action was necessary." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The standard is satisfied by the establishment

of a *prima facie* case of a constitutional or statutory violation. *See id.* This remedial power extends not merely to correct past and present discrimination which the public actor has caused; it also permits race-conscious steps designed to avoid perpetuating discrimination caused by other public or private entities. *See, e.g., id.* at 492 (rejecting the argument that a governmental body only possessed the power to remedy the effects of its own prior discrimination, and holding that public entities have "a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private injustice"); *see also Coral Constr. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991).

Despite the University's professed reliance on *Bakke's* diversity rationale in this litigation, a review of the record shows that a strong basis in evidence exists for remedial action to offset University admissions criteria that have an unnecessary disparate impact on otherwise qualified African-American and Latino applicants; to remedy the ongoing effects of the University's history of discrimination against minorities; and to counter the lingering vestiges of that discrimination, including the current negative and hostile racial climate on campus.

The district court found this evidence both unpersuasive and irrelevant, reflecting the uncertainty, if not confusion, among lower courts about the "strong basis in evidence" standard described in this Court's opinions in *Croson* and in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986). Granting the writ sought by present petitioners will allow the Court to resolve that uncertainty and to clarify the law by settling such questions as: May the "strong basis in evidence" be presented by putative beneficiaries of race-conscious decision-making, or only by the governmental actor? Must this justification have been openly articulated by the governmental actor at the time the challenged policy was first adopted? What

degree of evidentiary showing is necessary to demonstrate the "strong basis" that will justify consideration of race or ethnicity by a governmental entity or actor? Because, as recognized in *Wygant*, public agencies are understandably reluctant to admit prior discriminatory conduct, clarification of the law in this area is of paramount importance and provides a persuasive reason for granting the writ here sought. *See Wygant,* 476 U.S. at 291(O'Connor, J., concurring) (noting that public employers might be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken. . . . and liability to non-minorities if affirmative action *is* taken.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: October 14, 2002

No. 02-571

Supreme Court, U.S.
FILED
OCT 29 2002
CLERK

IN THE

Supreme Court of the United States

EBONY PATTERSON, *et al.*,
PETITIONERS,

v.

JENNIFER GRATZ AND PATRICK HAMACHER,
RESPONDENTS,

and

LEE BOLLINGER, JAMES J. DUDERSTADT, AND
THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN CONDITIONAL OPPOSITION TO CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

Whether public institutions of higher education may consider race and/or ethnicity as one of many factors in making admissions decisions in order to serve the compelling interest of remedying the lingering present effects of past discrimination.

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This petition arises out of a lawsuit that presents a challenge to the University of Michigan's College of Literature, Science, and the Arts' admissions program, which takes race and ethnicity into account as one of many factors in making admissions decisions. Respondents, the Board of Regents of the University of Michigan, Lee Bollinger, and James J. Duderstadt, hereby conditionally oppose the petition for a writ of certiorari before judgment.

This petition is related to two other petitions pending before this Court, *Grutter v. Bollinger*, No. 02-241, and *Gratz v. Bollinger*, No. 02-516. Petitioners here purport to present two questions: (1) whether race may be considered to achieve the educational benefits of diversity; and (2) whether race may be considered to remedy the present effects of past discrimination. Insofar as this petition purports to raise the first question, it merits no separate consideration. That question is clearly before this Court in *Gratz*, a case in which Petitioners here are Respondents. Accordingly, the only independent question actually presented is whether race may be considered to remedy the present effects of past discrimination.

This case—like *Gratz*—seeks certiorari before judgment in the court of appeals, which this Court's Rule 11 provides shall be granted only on a showing that the "case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." This petition, standing alone, does not satisfy that rigorous standard, for the same reasons Respondents set forth in their Conditional Opposition to the Petition for a Writ of Certiorari in *Gratz*.

As Respondents stated therein, if this Court were to grant the petition in *Grutter*, it would be appropriate also to grant review in *Gratz* to some, but not all, of the appeals. If this Court were to grant review in *Gratz*, Respondents do not oppose this petition for a writ of certiorari before judgment with respect to appeal No. 01-1438.

STATEMENT OF THE CASE

Factual Background

The University has made an educational judgment that a broadly diverse student body is an essential component of its educational mission because it "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." Pet. App. 4a (internal quotations and citation omitted).[1] Thus, to "facilitate the University's goal" of obtaining the educational benefits of diversity, the College of Literature, Science, and the Arts ("LS&A") considers race and ethnicity as one of many factors as it "strives to compose a class of students" that is broadly diverse. *Id.*

The Brief in Conditional Opposition to Certiorari Before Judgment in *Gratz* sets forth in detail the admissions systems employed by LS&A to obtain the educational benefits of diversity. Respondents in this case will not repeat those facts, but incorporate them by reference.

Procedural History

Plaintiffs Jennifer Gratz and Patrick Hamacher, both of whom are white, were unsuccessful applicants for admission to LS&A for the classes that enrolled in 1995 and 1997, respectively. On October 14, 1997, Plaintiffs brought this action on behalf of a class of similarly-situated applicants. The complaint asserted that the admissions policy of LS&A violates the Fourteenth Amendment's Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. §§ 1981, 1983. The plaintiffs sought declaratory and injunctive relief, and compensatory and punitive damages against the Board of Regents of the University of Michigan, as well as Lee Bollinger and James J. Duderstadt, both of whom are former presidents of the University of Michigan.

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[1] Citations to "Pet. App." are to the appendix to the petition in *Gratz v. Bollinger*, No. 02-516.

On February 5, 1998, a group of seventeen African-American and Latino students who applied, or intended to apply, for admission to the University of Michigan, along with Citizens for Affirmative Action's Preservation, a nonprofit organization that seeks to preserve opportunities in higher education for African-American and Latino students, moved to intervene as defendants in the case. The district court denied the motion to intervene. The court of appeals reversed that denial on an interlocutory appeal (heard along with an appeal from the denial of intervention in *Grutter*). *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). The defendant intervenors are the Petitioners in this case.

By an order dated December 23, 1998, the district court certified a class, pursuant to Fed. R. Civ. P. 23(b)(2), of those applicants who applied for and were denied admission to LS&A and who "are members of those racial and ethnic groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission." Pet. App. 3a & n.2. The district court also bifurcated the case into separate liability and damages phases. On September 26, 2000, the Sixth Circuit denied the University's petition for interlocutory review of the district court's certification order, pursuant to Fed. R. Civ. P. 23(f).

Following extensive discovery, on December 13, 2000, the district court issued an opinion granting, in part, cross motions for summary judgment. The district court concluded, following Justice Powell's opinion in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), that the University of Michigan has a compelling interest in seeking to obtain the educational benefits that flow from a student body that is diverse in many ways, including with respect to racial and ethnic diversity. Pet. App. 27a-28a. In reaching that conclusion, the district court also determined that, through the unrebutted reports of nationally-renowned experts in history, sociology, psychology, and education, the

University had presented "solid evidence" of the educational benefits of diversity. *Id.* at 22a-25a.

The district court noted, however, that "Justice Powell's opinion in *Bakke* fails to set forth any bright line regarding what constitutes a permissible consideration of race in admissions decisions," and that it "is often a thin line that divides the permissible from the impermissible." *Id.* at 34a (footnote omitted). The district court concluded that the admissions programs in operation in 1999 and 2000 satisfied the requirements set forth in *Bakke* and were therefore constitutional, whereas the systems in place from 1995 through 1998, taken together, "cross that thin line from the permissible to the impermissible." *Id.* The district court also granted the individual defendants' motions for summary judgment on qualified immunity grounds, holding that a reasonable official in the position of the individual defendants might not have known that the admissions systems in place from 1995 to 1998 would be found unconstitutional.

On January 10, 2001, the plaintiffs and defendants jointly requested that the district court, in connection with the entry of an order reflecting the conclusions set forth in its December 13, 2000 opinion, certify interlocutory cross-appeals pursuant to 28 U.S.C. § 1292(b). The district court, by order dated January 30, 2001, did so. On February 9, 2001, the district court also entered final judgment, pursuant to Fed. R. Civ. P. 54(b), in favor of the individual defendants who had prevailed on their qualified immunity defenses.

Following the district court's § 1292(b) certification of questions arising from its January 30, 2001 order, the plaintiffs and defendants each petitioned the court of appeals to permit the interlocutory appeals to proceed. By order dated March 26, 2001, the court of appeals granted the petition and cross-petition. Those appeals are pending in the court of appeals as Nos. 01-1416 and 01-1418. The plaintiffs also filed a notice of appeal, No. 01-1333, pursuant to 28

U.S.C. § 1292(a), with respect to the final order dismissing the claims against the individual defendants and denying the requested injunctive relief. Those three appeals were subject to consolidated briefing and argument in the court of appeals.

In a separate opinion, dated February 26, 2001, the district court rejected the arguments advanced by the intervening defendants that LS&A's consideration of race as a factor in admissions could be justified as a means to remedy the present effects of past discrimination. By order dated March 21, 2001, the district court also separately entered final judgment under Fed. R. Civ. P. 54(b) with respect to the claims of the intervening defendants, thereby permitting those defendants to bring an interlocutory appeal from its summary judgment rulings. The intervening defendants filed a notice of appeal as to the district court's order rejecting their defenses. That appeal, No. 01-1438, was briefed separately from the other three appeals in *Gratz*, but argued along with those appeals.

All four appeals were argued before the *en banc* court of appeals on December 6, 2001—the same date that the court heard argument in *Grutter*. The court of appeals issued its decision in *Grutter* on May 14, 2002. In that opinion, the court of appeals noted that it would "address the challenge to the University of Michigan's admissions policy, *Gratz v. Bollinger*, Nos. 01-1333, 01-1416, 01-1418, 01-1438, in a forthcoming opinion." *Grutter* Pet. App. 4a n.2. The court of appeals has not yet decided the *Gratz* case.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED FOR THE SAME REASONS SET FORTH IN CONDITIONAL OPPOSITION TO CERTIORARI BEFORE JUDGMENT IN *GRATZ*.

As Respondents stated in their Conditional Opposition in *Gratz* (No. 02-516), if this Court denies the petition in *Grutter* (No. 02-241), it should deny the petition for

certiorari before judgment in *Gratz*. If the *Gratz* petition is denied, then it follows that this petition for certiorari before judgment should be denied as well. The standard for granting certiorari before judgment is very demanding. "A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. Rule 11.

Assuming this Court denies the petitions for certiorari in *Grutter* and *Gratz*, nothing else presented in this petition even remotely suggests that the rigorous standard set forth in Rule 11 and this Court's cases regarding certiorari before judgment is satisfied. For that reason, this petition should be denied.

II. IN THE EVENT THIS COURT GRANTS CERTIORARI IN *GRUTTER* AND *GRATZ*, RESPONDENTS DO NOT OPPOSE THIS PETITION.

As stated in the Conditional Opposition in *Gratz*, if this Court were to grant the petition in *Grutter*, Respondents assert that that it would be appropriate to grant certiorari before judgment in *Gratz* in some, but not all, of the appeals now pending in the court of appeals. In the event the Court grants the petition in *Gratz*, Respondents do not oppose certiorari before judgment on appeal No. 01-1438 on the question whether the University of Michigan's admissions programs may be justified as a remedy for the present effects of past discrimination.

CONCLUSION

If (and only if) this Court grants certiorari in both the related cases of *Grutter v. Bollinger*, No. 02-241, and *Gratz v. Bollinger*, No. 02-516, then Respondents do not oppose this petition. Otherwise, for the foregoing reasons, the petition for a writ of certiorari before judgment should be denied.

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OCTOBER 2002

Supreme Court, U.S
FILED
NOV 8 2002
CLERK

No. 02-571

In The Supreme Court of the United States

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v.

JENNIFER GRATZ AND PATRICK HAMACHER, AND LEE BOLLINGER, JAMES J. DUDERSTADT, THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

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QUESTIONS PRESENTED

1. Is there appellate court jurisdiction for a district court's Rule 54(b) certification that does not dispose of any legally cognizable claims for relief?

2. Can a compelling interest sufficient for strict-scrutiny review of racial classifications be an interest not articulated, and actually disavowed by, the party responsible for the classifications?

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STATEMENT OF THE CASE

I. The Parties.

Respondents Jennifer Gratz and Patrick Hamacher were plaintiffs in the district court. They were appellees with respect to the appeal taken by the intervenors. They have filed a pending Rule 11 petition for certiorari (No. 02-516) arising out of the district court's January 30, 2001, order and February 9, 2001, judgment.

Respondents Lee Bollinger and James Duderstadt were at material times president of the University of Michigan, responsible to respondent Board of Regents of the University of Michigan, which operates the College of Literature, Science & the Arts ("LSA"), to which Gratz and Hamacher had applied for, and been denied, admission.

Petitioners Patterson, *et al.*, were intervenors in the district court and appellants with respect to the district court's Rule 54(b) certification entered March 21, 2001, which forms the basis for their Rule 11 petition.

II. The Proceedings Below.

Respondents Gratz and Hamacher commenced an action against respondents Lee Bollinger, James Duderstadt and the Regents of the University of Michigan (collectively "the University" or "the University defendants"). The complaint alleged that the University defendants had illegally discriminated against Gratz and Hamacher on the basis of their race in the consideration of their applications for admission to the LSA in 1995 and

1997, respectively. The complaint alleged violations of 42 U.S.C. §§ 1981, 1983, and 2000d.

The district court certified a class of plaintiffs, pursuant to Federal Rule of Civil Procedure 23(b)(2) in an opinion and order filed December 23, 1998. Patterson, *et al.* (collectively "intervenors" or "Patterson petitioners") were made parties to the case following an order of the Sixth Circuit reversing the district court's order denying intervention. *See Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (reversing orders denying intervention in both *Gratz* and *Grutter*).

The district court issued an opinion on December 13, 2000, and order on January 30, 2001, with respect to the cross-motions for summary judgment of plaintiffs and the University defendants. In that opinion and order, the district court granted plaintiffs' motion for partial summary judgment, declaring defendants' admissions system for years 1995-1998 unlawful (App. at 43a-48a[1]); granted defendants' motion for summary judgment with respect to their 1999 and 2000 admissions systems and plaintiffs' claim for injunctive relief, *id.* at 34a-43a; granted the motion of defendants Bollinger and Duderstadt for summary judgment on grounds of qualified immunity, *id.* at 48a-50a; and denied defendant Board of Regents' motion for summary judgment on grounds of Eleventh Amendment immunity, *id.* at 50a-54a. The January 30, 2001,

[1] Appendix citations are to the appendix filed with the pending *Gratz* petition for certiorari (No. 02-516).

Order also included a certification pursuant to 28 U.S.C. § 1292(b). App. at 58a. On February 9, 2001, the district court entered an order under Federal Rule of Civil Procedure 54(b) for entry of judgment with respect to the Section 1983 claims against the individual defendants, *id.* at 60a-62a; and a judgment to that effect was entered on the same day, *id.* at 63a-64a.

In a separate opinion filed on February 26, 2001, *id.* at 66a, and Rule 54(b) order filed on March 21, 2001, *id.* at 95a, the district court rejected the arguments of the intervenors for justifying the University defendants' racial preferences. The district court concluded that the intervenors had "failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination was the real justification for the LSA's race conscious admissions programs." *Id.* at 73a-74a (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 727 n.16 (1982)). The district court also concluded that the intervenors had failed to produce evidence of identified discrimination by the University in admissions, App. at 85a, or of "passive" participation by the University in the discrimination by others, *id.* at 86a. Finally, the district court rejected the intervenors' contention that the University's racial preferences in admissions could be justified by the alleged discriminatory impact of other admissions criteria. *Id.* at 86a-87a.

REASONS FOR DENYING THE WRIT

The Patterson petitioners provide many good reasons why this *case* (and that of *Grutter v. Bollinger* (No. 02-241)) presents issues of fundamental national importance

warranting review by the Court. Indeed, the petition includes some of the same arguments made by plaintiffs Gratz and Hamacher in their petition (No. 02-516). But the Patterson petitioners do not have a persuasive argument for issuing a writ of certiorari to answer the *question* that they present in their petition. Moreover, the manner in which the district court decided the case precludes the Patterson petitioners from filing any viable petition for certiorari. The only claim for relief decided by the district court for which the Patterson petitioners, intervenors in the case, have any arguably protectable interest or stake in the outcome is one on which the University – and hence the intervenors – were successful: Plaintiffs' request for an injunction with respect to the University's admissions policies. For that reason, as argued below, the Court's precedents prevent intervenors from filing a cross-petition, and they should not be permitted to accomplish effectively the same thing through the filing of a petition. This is all the more so because the district court erred as a matter of law in ordering entry of a separate final judgment under Federal Rule of Civil Procedure 54(b) with respect to the "claims" of the intervenors.

Denying the *Patterson* petition will not deprive those petitioners of the opportunity to raise the issues and arguments that they have raised below in defense of the University's admissions policies. This is so because, as respondents to the *Gratz* petition, the Patterson petitioners will be entitled to argue their distinct "remedial" justifications for affirming the district court's order denying plaintiffs' request for an injunction; under settled principles, they may argue for affirmance of the district court's order on grounds rejected or not relied upon by the district court.

Finally, even if there were a proper procedural basis for the filing of a petition by the Patterson petitioners, there are good reasons why the specific substantive question it presents does not merit granting the petition under the standards set forth in Supreme Court Rule 10. In arguing that the University's racial preferences in admissions can be justified by grounds not articulated by or motivating the University, the petitioners stake out a position that is completely at odds with settled law in the area of race-conscious remedies. Indeed, the intervenors can cite to no court decision anywhere (let alone a split among the lower courts) in support of their novel position that a proffered compelling interest need not be one that was articulated by the party adopting the preferences at issue. Additionally, this Court has rejected the kind of generalized, societal discrimination that constitutes much of what the Patterson petitioners offer in defense of the University's racial preferences. The petitioners have offered no "compelling reason" therefore, for granting their petition. *See* Supreme Court Rule 10.

Accordingly, respondents Gratz and Hamacher oppose the *Patterson* petition and respectfully request that it be denied.

I. There Is No Appellate Jurisdiction for the Intervenors' Appeal from the District Court.

As noted in their petition, the Patterson petitioners seek review of the judgment purportedly entered[2] in the

[2] Although the order of March 21, 2001, "ordered that final judgment is entered with respect to Defendant-Intervenors' claims," no such judgment was actually entered.

district court pursuant to Federal Rule of Civil Procedure 54(b) on March 21, 2001, "with respect to intervenors' claim that the University's use of race in admissions was justified as a remedy for the present effects of past and continuous discrimination." *Patterson* Petition at 2.

Plaintiffs opposed entry of a rule 54(b) judgment on the ground that the intervenors had no "claims" within the meaning of Rule 54(b) to dismiss. For the same reason, plaintiffs argued in their brief to the Sixth Circuit that the intervenors' appeal should be dismissed for lack of appellate jurisdiction. The *Patterson* petition now before the Court arises directly from the erroneous Rule 54(b) certification by the district court. That procedural defect alone should be sufficient reason to deny the petition.

The term "claim" has a precise legal meaning under the rules, a "cognizable claim for relief." *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980). *See also NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 291-92 (7th Cir. 1992) (Easterbrook, J.) (discussing distinction between a "claim for relief" and a "legal theory"). When a "claim" has been disposed of, judgment can be entered with respect to it; judgments do not get entered on "issues" or "affirmative defenses."

Plaintiffs do not have any "claims," *i.e.*, causes of action, against the intervenors. Likewise, intervenors have no "claims" against plaintiffs; they have only arguments and defenses asserted against plaintiffs' claims (causes of actions under 42 U.S.C. §§ 1981, 1983, and 2000d) against the University defendants. Accordingly, the district court

did not dispose of any "claims" by either plaintiffs or intervenors with respect to the other.[3] Instead, it resolved certain *issues* against the intervenors, an event which clearly did not satisfy the appealability standards of 28 U.S.C. § 1291. The fact that intervenors opposed plaintiffs' motion for summary judgment on some grounds that were not also urged by the University defendants, and that these grounds were not addressed in the district court's December 13, 2000, opinion, does not render the February 26, 2001, or March 21, 2001, orders into orders disposing of claims nor change anything with respect to the appealability of the March 21, 2001, order. This is the classic case, then, in which the requirements of Rule 54(b) have not been met, so the district court erred as a matter of law.

A district court by definition abuses its discretion when it makes an error of law. *Koon v. United States,* 518 U.S. 81, 100 (1996). Because the district court abused its discretion in certifying the March 21, 2001, order, under Rule 54(b), there is no appellate jurisdiction for the intervenors' separate appeal. *See* 10 Moore's Federal Practice, § 54.28[2] (Matthew Bender 3d ed. 1997); *see also, e.g., Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 806 (8th Cir. 1993) ("If the Rule 54(b) determination is ineffective, however, we lack jurisdiction because there is no final district court order."); *Ebrahimi v. City of*

[3] It did, however, resolve plaintiffs' *claims* for damages against the individual defendants, which were therefore properly the subject of the district court's Rule 54(b) certification respecting those claims. It also resolved plaintiffs' claims for injunctive relief by dismissing them on summary judgment. To be clear, if the district court had granted some form of injunctive relief against the University, intervenors would have been able to appeal.

Huntsville Bd. of Educ., 114 F.3d 162, 165-68 (11th Cir. 1997); *Hogan v. Consolidated Rail Corp.*, 961 F.2d 1021, 1026 (2d Cir. 1992).

II. The *Patterson* Petition Is Superfluous.

If the petition in *Gratz* is granted, denying the *Patterson* petition will not deprive those petitioners of the opportunity to make their distinct "remedial" arguments in defense of the University's racial preferences. When the Sixth Circuit granted permission to appeal pursuant to 28 U.S.C. § 1292(b), following the district court's certification pursuant to that statute, appellate jurisdiction was vested over any question included within the order that contains the controlling issue of law. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204 (1996). Accordingly, there is appellate jurisdiction to consider issues and arguments raised by the intervenors in the district court in opposing plaintiffs' request for an injunction. Moreover, under well-settled principles, in arguing for affirmance of the district court's order denying plaintiffs' request for an injunction, the Patterson petitioners may urge reasons rejected or not relied upon by the district court. *See, e.g., Brown v. Allen,* 344 U.S. 443, 459 (1953) ("'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'") (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

For these same reasons, the Patterson petitioners could not have filed a cross-petition to the *Gratz* petition. The Patterson petitioners were successful on the only claim in which they could have any cognizable interest as

intervenors,[4] *viz.*, plaintiffs' claim for injunctive relief. Although 28 U.S.C. § 1254 permits any party to seek a writ of certiorari, the Court has made clear that a successful party may not cross-petition; instead it can argue for affirmance on any ground raised in the court below. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 & n.8 (1994). The Patterson petitioners should not be permitted to circumvent this rule by labeling as a "petition" what is in effect an improper cross-petition. This is particularly so since the purported basis for the separate petition is the improper Rule 54(b) certification and appeal that followed from it. *See* discussion *supra* at 5-7.

III. There Is No Compelling Reason To Review the Question Presented by the Patterson petitioners.

Although the *Patterson* petition contains in the Question Presented references to both a "diverse student body" and "remedying past and present discrimination" as justifications for racial preferences in admissions, *Patterson* Petition at i, the petition leaves no doubt that it is directed primarily to the latter concern. The *Gratz* petition quite clearly has already presented the Court with the

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[4] Although the Sixth Circuit reversed the district courts' orders denying intervention in this case and in *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (allowing intervention as a matter of right in both *Gratz* and *Grutter*), there are good reasons for concluding that in neither case do the intervenors have the kind of protectable interest required for intervention as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). *See Grutter*, 188 F.3d at 401 (Stafford, J., dissenting). This is another valid reason for denying the *Patterson* petition.

question concerning whether an interest in "diversity" can justify racial preferences. What is different in the *Patterson* petition is the focus on "remedying past and present discrimination," and whether such a remedial interest can be a compelling one "whether or not the university articulates the remedial justification for the policy." *Id.*

The Patterson petitioners no doubt have framed the question as they have because the University has *not* articulated the effects of past or present discrimination by or at the University as a justification for its racial preferences in admissions. Quite to the contrary, the University has *disavowed* any reliance on the remedial justification proffered by intervenors. In the University's brief to the Sixth Circuit, for example, it made the point quite explicitly:

> Although Defendant-Intervenors [have] argued that 'LSA has a compelling interest in remedying the University's past and current discrimination against minorities,' the University has 'never justified [its] race-conscious admissions policies on remedial grounds,' and does not do so here.

University-defendants' brief at 3 n.2 (Appeal Nos. 01-1333, 01-1416, 01-1418).

This Court has repeatedly and consistently made clear that post-hoc rationalizations that did not actually motivate a party to adopt the racial or other discriminatory classifications to which heightened scrutiny applies cannot be used to justify those classifications. In the area of racial classifications, the leading case is *Shaw v. Hunt*, 517 U.S. 899 (1996). In that case, the Court invalidated the drawing of two predominantly minority voting districts by the North Carolina legislature. One of the dissenters on the Court would have upheld the redistricting plan on the

grounds, among others, that several reasons "may have motivated" the legislature to favor the creation of two minority districts. *Id.* at 941 (Steven, J., dissenting). However, the Supreme Court agreed with the district court's conclusion that the State had *not* been motivated by an interest in ameliorating past discrimination, noting that "[w]hile some legislators invoked the State's history of discrimination as an argument for creating a second majority-black district, the court found that these members did not have enough voting power to have caused the creation of the second district on that basis alone." *Id.* at 909. Based on this finding, the Court concluded that the remedial rationales proffered by the State did not and could not support its redistricting plan:

> [A] racial classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. To be a compelling interest, the State must show that the alleged objective was the legislature's "actual purpose" for the discriminatory classification . . . .

Id. at 908 n.4 (citing *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 730 & n.16 (1982)).

The case cited and relied upon by the Court in *Shaw* for the foregoing proposition is one that in fact arose in the university admissions context. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court struck down a university admissions system that excluded men from a nursing school. In litigation, the state justified its exclusionary policy on the ground that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." *Id.* at 727-28. However, the Court concluded that the exclusionary policy actually perpetuated stereotyped views of women and that

"although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective [was] the actual purpose underlying the discriminatory classification." *Id.* at 730; *see also id.* at 730 n.16 ("Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination.").

In *United States v. Virginia,* 518 U.S. 515 (1996), the Court again made clear in the educational admissions context that a governmental interest sufficient to justify gender discrimination must be one that actually motivated the state's discriminatory conduct. In that case, the Virginia Military Institute asserted that it had relied on educational diversity and the "pedagogical benefits" to some students of single-sex education. *Id.* at 535. The Court did not reach the question whether these stated interests were important governmental interests[5] that could justify gender discrimination because the Court found that the proffered justifications were not the state's "actual purposes" in excluding women from their school:

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[5] Because both *Hogan* and *United States v. Virginia* involved gender discrimination, the Court applied an "intermediate" standard of review that requires the state to show that the challenged classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *United States v. Virginia*, 518 U.S. at 533. The "strict" standard of scrutiny that must be applied to the University's race-conscious admissions policies in the present case is even more restrictive.

> Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

Id. at 535-36 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n.16 (1975) ("'mere recitation of a benign [or] compensatory purpose' does not block 'inquiry into the actual purposes' of government-maintained gender-based classifications")); *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977) (rejecting government-proffered purposes after "inquiry into the actual purposes").

The Patterson petitioners have offered no persuasive reason for the Court to undo these settled precedents. They cite to no split in the lower courts on interpreting the meaning of the precedents. In fact, they do not cite to a *single case* in which a court has accepted their view that the interest justifying a racial classification can be an interest not articulated by or motivating the party responsible for the classification. The lower courts instead have consistently adhered to the rule articulated in *Shaw v. Hunt* and the other cases discussed above. *See, e.g.*, *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 597 (3rd Cir. 1996) (in action challenging city ordinance creating subcontracting set-asides, Court holds that "[t]he party challenging the race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy

race discrimination in which the municipality played a role"); *Podberesky v. Kirwan*, 956 F.2d 52, 56 n.4 (4th Cir. 1992) (race-based scholarship could not be justified on diversity grounds where "it does not appear that [University] established the [scholarship] with this goal in mind"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (Justice Department's identification of "compelling interests" supporting FCC affirmative action program held irrelevant; "[a]s the independent agency which promulgated the regulations in question, [FCC's] view of the government interest it was pursuing must be accepted").

The Patterson petitioners cite authority for the proposition that a governmental entity may be reluctant to produce evidence of its own past discrimination in justifying racial preferences. *See Patterson* Petition at 25. But it does not follow from this that anything other than the entity's actual motives must be shown to justify the preferences. If the University was reluctant to present evidence that its motives for the racial preferences were based on the effects of its past or present discrimination in admissions, the intervenors were free to present such evidence.[6] They presented none, as the district court found. App. at 73a-74a.

There are quite logical reasons why post-hoc rationales for racial preferences should not be able to justify the

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[6] The Sixth Circuit's decision allowing intervention provided precisely that opportunity to the intervenors. The opinion does not, however, contain support for the proposition that the intervenors could rely on post-hoc rationalizations that did not motivate the University defendants.

preferences. Strict scrutiny, to which all such preferences must be subjected, requires both a compelling interest and a remedy that is "narrowly tailored" to achieve that interest. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). If a compelling interest could be one articulated after the fact, and by someone other than the party employing the preferences, it could only occur by chance that a remedy had been "narrowly tailored" to achieve the belatedly asserted compelling interest.

The Patterson petitioners argue that review on certiorari is warranted because they consider there to be "uncertainty, if not confusion, among the lower courts about the 'strong basis in the evidence standard' described" by this Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), and by the plurality in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). *Patterson* petition at 24. The petition cites to no cases where such "uncertainty" or "confusion" has been indicated. More importantly, however, the *Patterson* petition and the question it presents have little if anything to do with the strength of the evidentiary basis (which can be adequately assessed through granting the *Gratz* petition) underlying the University's racial preferences. Instead, they only divert attention away from the University's stated basis for adopting the preferences by focusing on justifications that the Patterson petitioners like better.

It is noteworthy also how unfocused are the issues that the Patterson petitioners have framed. Their Question Presented vaguely references "past and present discrimination at the university," *Patterson* Petition at i, without indicating any connection to discrimination in student *admissions*, which is what plaintiffs' complaint is all about. Much, if not all, of the argument and evidence

presented by the intervenors in the district court related to discrimination or racial incidents committed by individuals not under the control or authority of the University, or acts wholly unrelated to admissions decisions, or both. Petitioners have collected anecdotes, some stretching back decades before this action was filed, about campus housing policies and fraternity discrimination in the 1950s and 1960s, radio programming, racial epithets, and much else having nothing to do with admissions policies. They have made no coherent explanation of how such a disparate litany of events, incidents, and complaints unconnected to admissions decisions presents a question worthy of answer by the Court on a writ of certiorari. In its best light, the *Patterson* petition can be viewed as an attempt to urge the Court to adopt a rule that the lingering effects of generalized societal discrimination can be a compelling interest justifying racial preferences by a state actor. The Court's precedents foreclose that argument, *see*, *e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989), and the Patterson petitioners have not offered a good reason to reopen the issue.

The only arguments directed by the Patterson petitioners to the admissions policies of the University relate to the alleged "disparate" impact of admissions criteria on students from certain racial minority groups. As the district court noted, the "narrowly-tailored" remedy to any such criteria would be to remove them, not to add to them with racial preferences. App. at 88a. The issue is certainly not one that warrants review on certiorari.

Finally, it is worth reiterating that the *Patterson* petition presents the issues it raises for review in a very abstract way. Those petitioners, as intervenors, have no legally cognizable claims, and no claims have been made

against them. Not one of the intervenors has alleged that the University has acted unlawfully with respect to him or her or that the district court's opinion (which denied plaintiffs' claim for injunctive relief) makes it likely to do so. Respondents Gratz and Hamacher submit that under these circumstances it is not appropriate to issue a writ of certiorari to review a question that was not raised by either the parties asserting claims or the parties against whom those claims have been asserted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari by the Patterson petitioners should be denied.

Respectfully submitted,

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ORIGINAL

Supreme Court, U.S.
FILED
OCT 16 2002
CLERK

No. 02-571 (4)

IN THE
SUPREME COURT OF THE UNITED STATES

EBONY PATTERSON, *et al.*,

Petitioners,

v.

JENNIFER GRATZ AND PATRICK HAMACHER,

Respondents,

and

LEE BOLLINGER, JAMES J. DUDERSTADT, AND
THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Sixth Circuit

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Respondents, the Board of Regents of the University of Michigan, Lee Bollinger, and James J. Duderstadt hereby respond to Petitioners' motion to advance this Court's consideration of the above-captioned petition.

Prior to the filing of the petition in *Patterson*, two other related petitions were otherwise pending before this Court, *Grutter v. Bollinger*, No. 02-241, and *Gratz v. Bollinger*, No. 02-516. Each of those petitions presents the question whether a public university has a compelling interest in achieving the educational benefits of diversity that can justify the consideration of race as one of many factors in admissions decisions. The *Grutter* case arises out of a challenge to the admissions program of the University of Michigan Law School, while the *Gratz* case arises from a challenge to the admissions program of the University of Michigan's College of Literature, Science and the Arts – the University's largest undergraduate college. The two lawsuits from which these petitions arise have proceeded on parallel tracks in the district court and the court of appeals.

The response to the *Grutter* petition is due on October 29, 2002. Respondents understand, based on publicly-available information provided by the Clerk's Office, that the petition will be scheduled to be conferenced on November 27, 2002. The response to the *Gratz* petition is due on Monday November 4, 2002. Respondents further understand that so long as any response in *Gratz* is filed on or before Friday November 1, 2002, the two cases may be considered, as companion cases, in the same conference. Respondents therefore intend to file their response in *Gratz*, along with their response in *Grutter*, on October 29, 2002.

Respondents support Petitioners' motion to shorten the time for response because we believe that it is appropriate for the Court to consider all three petitions at the same

conference. It appears that this objective can only be accomplished, however, by requiring responses to the *Patterson* petition to be filed no later than November 1, 2002. (The date requested by the *Patterson* petitioners, Saturday November 2, 2002, would permit a timely response to be filed on Monday November 4, 2002 – in which case the petition would not be conferenced until December 6, 2002.) Accordinlgy, Respondents request that November 1, 2002 be set as the due date for any response to the *Patterson* petition.

Respondents note, however, that the question presented in the *Patterson* petition – *i.e.*, whether the University of Michigan's admissions policies can be justified as a remedy for the lingering present effects of alleged past discrimination – although arising out of the *Gratz* case, is analytically distinct from the common questions presented in the petitions in *Gratz* and *Grutter* – *i.e.*, whether public universities may consider race in admissions decisions in order to achieve the educational benefits that flow from a diverse student body. Accordingly, if this Court were not to grant the Motion to Advance, it should nevertheless consider the existing *Gratz* and *Grutter* petitions together as companion cases, at its conference scheduled for November 27, 2002. In that event, the Court could independently act on the separate question presented in *Patterson* when it is fully briefed in the ordinary course.

Respectfully submitted,

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No. 02-571

(5)

In the Supreme Court of the United States

EBONY PATTERSON, ET AL.,

PETITIONERS,

V.

JENNIFER GRATZ AND PATRICK HAMACHER,
AND
LEE BOLLINGER, JAMES J. DUDERSTADT, THE
BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

RESPONDENTS.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

RESPONDENTS GRATZ AND HAMACHER'S OPPOSITION TO THE MOTION TO ADVANCE

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Respondents Gratz and Hamacher oppose petitioners' motion to advance (shorten) the time to respond to their petition for certiorari (the "*Patterson* petition"). Gratz and Hamacher are the petitioners in No. 02-516, now pending before the Court (the "*Gratz* petition"); they intend to file a response to the *Patterson* petition, but those petitioners have not provided sufficient reasons to justify shortening the time within which to respond.

Gratz and Hamacher agree that this *case* presents issues of fundamental national importance on which the lower courts are sharply divided. As they have already argued in their own petition, Gratz and Hamacher also believe that due to the nature of the constitutional and civil rights issues involved and the time-sensitive nature of the admissions process, it is appropriate and important for the Court to review the district court's judgment pursuant to Supreme Court Rule 11, which allows review before judgment in the courts of appeals. Gratz and Hamacher and the class that they represent believe that it is important for the Court to decide the issues raised in their petition during the current term of the Court, which might not otherwise occur, depending on when the Sixth Circuit finally issues a decision in the case.

Petitioners here were intervenors in the District Court. The *Patterson* petition was filed about two weeks after the *Gratz* petition. Both petitions arise out of the same case in the United States District Court for the Eastern District of Michigan relating to the racial preferences in admission of the flagship undergraduate college of the University of Michigan, the College of Literature, Science & the Arts. Under the Court's rules and the docket entry of the Gratz

petitioners' lodging, dated October 3, 2002, respondents have until November 2, 2002 within which to file a response to the *Gratz* petition.[1] Under the same rule, respondents to the *Patterson* petition have 30 days from the date on which the case was placed on the docket, *viz.*, October 16, 2002, to file a response. Sup. Ct. Rule 15.3. Thus, briefs in opposition currently are due on or before November 15, 2002. Contemporaneously with the filing of the *Patterson* petition, however, intervenors filed a motion seeking to advance the time for filing of a response. Specifically, the Patterson petitioners seek an order making responses to their petition due on the same date that responses are due to the earlier-filed *Gratz* petition. The stated reason for the motion to advance is to put the *Gratz* and *Patterson* petitions and the petition in *Grutter v. Bollinger* (No. 02-241) (the "*Grutter* petition"), relating to the racial preferences in admissions of the University of Michigan Law School, on the same schedule for review.

The reasons that justify granting of a Rule 11 petition for certiorari, however, do not justify shortening the time to respond to the *Patterson* petition. First, as Gratz and Hamacher will argue in their response, the *Patterson* petition is at best superfluous.[2] The issues that the Patterson petitioners seek to address

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[1] Because November 2, 2002, falls on a Saturday, the due date for filing a response to the Gratz petition is actually Monday, November 4, 2002.

[2] It deserves mention that, although 28 U.S.C. § 1254 permits any party to seek a writ of certiorari, this Court's precedents would have prevented the Patterson petitioners from filing a cross-petition to the *Gratz* petition. The Patterson petitioners were successful on the only claim in which they possibly could have an interest, *viz.*, plaintiffs' claim for injunctive relief, and complain

(continued...)

through their petition can be raised in response to the *Gratz* petition. This is so because, as respondents to the *Gratz* petition, the Patterson petitioners are entitled to argue their distinct "remedial" justifications for affirming the district court's order denying plaintiffs' request for an injunction. *See, e.g.*, *Brown v. Allen*, 344 U.S. 443, 459 (1953) ("'In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'" *quoting Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

Even if there were an independent basis for granting the *Patterson* petition, there is no imperative reason for shortening the time to respond to it. The premise of the motion to advance is that the *Gratz*, *Grutter*, and *Patterson* petitions should all be considered together at the same conference. There is no reason, however, to crimp the briefing schedule on one petition, so that they can all be considered at one conference. That is so particularly with respect to the *Grutter* petition, on the one hand, and the *Gratz* and *Patterson* petitions on the other, because they arise from judgments and orders entered by two different district courts. In any event, if the Court believes that all the petitions should be heard at the same conference, it is obviously capable of considering the *Patterson* petition with less than the full amount of time normally allotted.

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[2] (...continued)
only that their particular argument for denial of that injunction was rejected. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 & n.8 (1994) (successful party could not file cross-petition, although they could argue for affirmance on any ground raised in the court below).

Respondents Gratz and Hamacher intend to proceed diligently in preparing a response to the *Patterson* petition, and may manage to file their brief before the current November 15 deadline.[3] But Gratz and Hamacher respectfully submit that they should not be given substantially less time to respond to the *Patterson* petition than Patterson and the University have had to respond to the *Gratz* petition.

CONCLUSION

For the foregoing reasons, Respondents Gratz and Hamacher submit that Petitioners' motion to advance should be denied.

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[3] The University respondents have proposed a response date of November 1, 2002, even earlier than the one proposed by the Patterson petitioners. If it had been made in a motion, Gratz and Hamacher would have opposed that suggestion for the same reasons that they oppose the Patterson motion for advancing the due date.

Respectfully submitted,

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